Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,

No. 80-2160

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS, on behalf of themselves and on behalf of the congregation of the MT. JEZREEL BAPTIST CHURCH, a District of Columbia corporation,

Petitioners,

v.

AULIN E. JOHNSON, BALIS A. DUNLAP, JR., GEORGE A. BROWN, JOHN A. DAVIS, ANDREW T. FLEMING, ROBERT HAIGLER, NELSON C. MALONE, YVONNE SMITH, ELDRIDGE SPEARMAN, WILLIAM SWANN and BERNARD A. WADE, individually and as trustees of the MT. JEZREEL BAPTIST CHURCH, and HAROLD E. TRAMMELL, pastor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

CHARLES E. WILLIAMS
1329 Shepherd Street, N.W.
Washington, D.C. 20011
Counsel for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED

1. Does this Court's seminal decision in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1961), authorize the Superior Court of the District of Columbia (an Article I court bound by the Federal Rules) to dismiss with prejudice, *sua sponte*, the petitioners' accounting and fraud suit for failure of diligent prosecution (where the pleadings establish that a fiduciary relation exists between petitioners and the respondent church trustees) without prior notice and an opportunity to explain the delay on the record; without compliance with the local civil rule requiring prior written notice; without determining petitioners' pretrial discovery motion to compel respondents to authorize disclosure of Federal payroll tax return information that had been pending court determination for six months; and without regard to the criteria regularly applied by Article III courts in dismissing suits for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedures?

2. Did the court below deny petitioners' right of procedural due process by limiting its review to the *sua sponte* dismissal of the suit by the trial court for failure to prosecute the fraud claim and in failing to review the trial court's denial of the petitioners' motion for summary judgement for an accounting based on the fiduciary relation existing between the parties, a claim separate and distinct from the claim for recovery based on fraud?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	2
JURISDICTION	2
STATUTES AND RULES INVOLVED	2,3,4
STATEMENT OF THE CASE	5
REASONS FOR ALLOWANCE OF THE WRIT	11
CONCLUSION	17

TABLE OF AUTHORITIES

	Page
Cases:	
Abbot Laboratories v. Gardner, 387 U.S. 136 (1967)	16
Bautista v. Concentrated Employment Program of the Department of Labor, 459 F.2d 1019 (9th Cir. 1972)	12
Cafritz v. Corp. Audit Co., 60 F. Supp. 627 (D. D.C. 1945)	10n
California Diversified Promotions, Inc. v. Musick, 505 F.2d 278 (9th Cir. 1974)	12
Chira v. Lockheed Aircraft Corp., 30 FR Serv2d 576 (2d Cir. 1980)	14
Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979)	15
Dove v. Codesco, 569 F.2d 807 (4th Cir. 1978)	15

Glo Co. v. Murchison & Co.,
397 F.2d 928 (3d Cir. 1967), *cert. denied*, 393 U.S. 939 (1968) 14

Gonzalez v. Firestone Tire & Rubber Co.,
610 F.2d 241 (5th Cir. 1980) 14

Huffman v. Pursue, Ltd.,
420 U.S. 592 (1975) 16

Link v. Wabash Railroad Co.,
370 U.S. 626 (1961) 7,12

Marks v. San Francisco Real Estate Board,
30 FR Serv2d 582 (9th Cir. 1980) 15

Peterson v. Term Taxi, Inc.,
429 F.2d 888 (2d Cir. 1970) 15

Reizakis v. Loy,
490 F.2d 1132 (4th Cir. 1974) 14

Rosenak v. Poller,
290 F.2d 748 (D.C. Cir. 1961) 10n

Saylor v. Bastedo,
623 F.2d 230 (2d Cir. 1980) 14

Tolson v. Hodge,
411 F.2d 123 (4th Cir. 1969) 15

Vina v. Hub Electric Co.,
480 F.2d 1139 (7th Cir. 1973) 12

Wohl v. Keene,
476 F.2d 171 (4th Cir. 1973) 6

Zenith Corp. v. Hazeltine,
395 U.S. 100 (1969) 16

Statutes:

D.C. Code §11-101(2) 2

D.C. Code §11-946 3

Rules:

Fed. R. Civ. P. 41(b) 3
Super. Ct. Civ. R. 41(b) 3
Super. Ct. Civ. R. 41-I 8,10,11
Ct. Cl. R. 102(b) 15
Cust. Ct. R. 8.3(b) 15
Tax Ct. R. 123(b) 15

Books:

1 C.J.S. *Accounting* §19 (1936) (Cum. Supp. 1980) 10n
1 C.J.S. *Accounting* §20 (1936) (Cum. Supp. 1980) 11n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS,
on behalf of themselves and on behalf of the congregation
of the MT. JEZREEL BAPTIST CHURCH,
a District of Columbia corporation,

Petitioners,

v.

AULIN E. JOHNSON, BALIS A.DUNLAP, JR.,
GEORGE A. BROWN, JOHN A. DAVIS,
ANDREW T. FLEMING, ROBERT HAIGLER,
NELSON C. MALONE, YVONNE SMITH,
ELDRIDGE SPEARMAN, WILLIAM SWANN
and BERNARD A. WADE, individually and as trustees
of the MT. JEZREEL BAPTIST CHURCH, and
HAROLD E. TRAMMELL, pastor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Lorraine A. Williams and Charles E. Williams, petitioners, pray that a writ of certiorari issue to review the final judgment entered by the District of Columbia Court of Appeals on February 11, 1981, affirming the order of the Superior Court of the District of Columbia that dismissed

petitioners' suit for an accounting for failure to prosecute on June 11, 1979, as to which a rehearing was denied on March 24, 1981.

OPINIONS BELOW

The opinion and order of the Superior Court of the District of Columbia, filed June 11, 1979, is printed as Appendix A, *infra.* The opinion of the District of Columbia Court of Appeals and dissenting opinion are reproduced, *infra,* as Appendix B. The order denying rehearing en banc is printed, *infra,* as Appendix C.

JURISDICTION

The judgment sought to be reviewed was entered February 11, 1981. A timely petition for rehearing was filed February 24, 1981, and denied by order entered March 24, 1981. The jurisdiction of this Court is invoked under sections 1254(1) and 2101(c) of Title 28, *United States Code.*

STATUTES AND RULES INVOLVED

Section 11-101(2) of the District of Columbia Code provides:

> The following District of Columbia courts established pursuant to article I of the Constitution:
> (A) The District of Columbia Court of Appeals.
> (B) The Superior Court of the District of Columbia.

Section 11-946 of the District of Columbia Code provides:

> The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

Rule 41(b) of the Federal Rules of Civil Procedure and Rule 41(b) of the Superior Court Civil Rules provide:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal order under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction,

for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 41-I of the Civil Rules of the Superior Court of the District of Columbia provides:

DISMISSAL FOR FAILURE TO PROSECUTE

(a) DISMISSAL WITHOUT PREJUDICE; NOTICE OF; WARNING. If a party seeking affirmative relief fails for six months from the time action may be taken to comply with any law, rule or order requisite to the prosecution of his claim, to avail of a right arising through the default or failure of an adverse party, or take other action looking to the prosecution of his claim, and such party has been sent a warning as required by section (b) of this rule, the complaint, counterclaim, crossclaim, or third-party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailings he shall make an entry.

(b) WARNING. One month prior to the termination of the six month period, the clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making and entry in the docket of the mailing. If the case has been assigned to a single judge, notice of this warning shall also be given to that judge.

(c) REFERRAL TO THE DISCIPLINARY BOARD. When a case has been dismissed because of inexcusable neglect or other dereliction of counsel and is reinstated by the court to prevent unfairness to a litigant, the court granting the motion to reinstate may refer the matter involving the delinquent or offending counsel to the *Disciplinary Board of the District of Columbia Court of Appeals* for appropriate action, citing the circumstances of the dismissal and subsequent reinstatement.

STATEMENT OF THE CASE

This suit was instituted in the Superior Court of the District of Columbia to enforce the unanimous order of the congregation of the Mt. Jezreel Baptist Church for an audit examination of its books of account covering years 1967 through 1975. The suit was brought as a class action by Church members, attendants, and regular contributors against the trustees and pastor for an accounting of funds of $21,123.76, or more, as well as trust fund taxes of $40,019.77 that were not paid over to the United States during 1971, 1973, 1974 and 1975. The suit also includes a claim for recovery based on fraud.[1]

The Church was incorporated in 1883 as a religious society under the laws of the District of Columbia. The gravamen is that the trustees breached the fiduciary duty to periodically account to the congregation for property and funds in their hands; that the trustees deliberately violated the congregation's specific instruction to account; that they fraudulently, wrongfully, or negligently suffered and caused the funds and property of the corporate estate to be wasted, squandered, and diverted; and that the trustees were aided and abetted by the pastor in the alleged breach of duty.

The trustee-respondents filed their answer and counterclaim for $550,000.00 March 22, 1977. The pastor counterclaimed for $50,000.00. The issues were joined August 29, 1977.

---

[1]The finding in footnote 3 of the trial judge's opinion (Appendix A, *infra*, at 5a) that petitioners acquiesced in the respondents' management of the Church's fiscal affairs is not based on any fact in the record. Moreover, laches—which the court says would constitute a good defense—was not asserted as an affirmative defense.

Thereafter, four informal status hearings and a pretrial conference were held. Petitioners were deposed by respondents and petitioners conducted and filed 15 depositions. In addition, petitioners prosecuted four pretrial motions and one post decision motion. No trial or evidentiary hearing was held. Thus no question of credibility is involved.

Even though the pleadings, exhibits, and depositions on file established a prima facie case for an accounting, the trial judge denied petitioners' motion for summary judgment for an accounting on March 7, 1978, because of genuine issues as to the fraud claim. The trial judge states that he refused to refer the matter to the court auditor because petitioners had not made a prima facie showing of wrongdoing (fraud) despite the prima showing of a fiduciary relation existing between the parties—the elemental basis for an accounting.

This case, determined to be complex, was certified as a Civil I Branch case under Superior Court Civil Rule 40-II. (The rule is reproduced as Appendix D, *infra.*) But the trial judge did not attempt, at the pretrial conference, to have the parties narrow the issues or to seriously consider settlement as did the trial judge in the Civil I case of *Pleasant Grove Baptist Church v. Chandler,* Civil Action No. 1669-77, in which a basis for settlement was reached at pretrial.

Petitioners' suit was dismissed July 23, 1979, *sua sponte* under Rule 41(b) even though passage of time alone without detrimental prejudice to the respondents does not justify the harsh sanction of dismissal with prejudice. *Wohl v. Keene,* 476 F.2d 171, 176 (4th Cir. 1973). But the decisions below are based entirely on the lack of ordinary diligence per se and the unintentional violation of an oral order of the trial judge. Aside from *Link,* all of the cases cited by the trial judge predate *Link.*

Both of the courts below recited the portion of *Link* which states, in pertinent part, that the policy of Rule 41(b) does not require the conclusion "that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained *dormant because of the inaction or dilatoriness of the parties seeking relief.*" 370 U.S. at 630-631. (Emphasis supplied.) But the record here does not sustain the conclusion that the petitioners allowed their claim for recovery to lay *dormant* for any appreciable period of time. Moreover, this case was not on a trial calendar. The manner in which petitioners moved the case along in Superior Court is demonstrated by analysis of the following docket entries of proceedings taken by petitioners and the trial court:

Date	Proceedings (Filed)	Delay Mos.	Days
1977			
03-10	Complaint		
05-03	Deposition (IRS)	1	13
06-20	Amended Complaint	1	17
08-03	Deposition (party)	1	13
11-14	Deposition (6 parties)	3	12
1978			
02-06	Deposition (IRS)	2	21
02-17	Motion for Summary Judgment		11
02-22	Pretrial Conference		
03-07	Order Denying Motion for Summary Judgment		
03-11	Motion to Certify Suit as Class Action		21
06-05	Deposition (IRS)	2	24
07-28	Deposition (IRS)	1	22
08-28	Order Denying Certification as Class Action		
10-24	Deposition (party)	2	27

Date	Proceedings (Filed)	Delay Mos.	Days
10-25	Deposition (party)		
1979			
01-16	*Motion to Compel Disclosure of Tax Returns & Tax Return Information	2	21
07-23	*Sua Sponte* Order Dismissing the Suit	6	7
10-11	*Sua Sponte* Order Dismissing the Counterclaims	3	19
10-17	Petitioners' Motion to Vacate Dismissal Order		

Superior Court Civil Rule 41-I, which was promulgated a year after adoption by the court of Rule 41(b) of the Federal Rules, provides for dismissal *without* prejudice if a party fails for six consecutive months to move his case along and for written notice to the dilatory party at the end of the fifth month. No such notice was ever issued to petitioners clearly and simply because the above-listed docket entries show that there was never a five-month delay on petitioners' part in prosecuting the claim.

But the trial judge, disregarding the said Rule 41-I and the fact that oral depositions taken had been filed in June, July, and October of 1978 as legitimate prosecutorial activity (and treating the discovery motion filed January 16, 1979, as frivolous) concluded that petitioners "did nothing for nine months" between March 7, 1978, and January 16, 1979.

---

*The motion was filed to obtain the answer to the question raised by the trial judge in his March 7, 1978, order, *viz.*, whether the IRS was looking to the Church for payment of the outstanding trust fund taxes.

The court of appeals likewise erroneously concluded that petitioners "literally did nothing for the next nine months [after October 13, 1978] (whereupon the case was dismissed)." Appendix B, *infra,* at 1b.

Neither of the courts below took note of the essential unfairness in the *sua sponte* dismissal of the $65,000.00 claim after "nine months" of inactivity—calculated differently by each of the courts below—while the respondents were allowed to maintain their counterclaims of $600,000.00 during 30 consecutive months of absolute inactivity.

Moreover, of the cases filed March 9, March 10, and March 11, 1977 (this case was filed March 10, 1977), 17 of them are still pending without settlement or dismissal orders entered. (The cases are listed in Appendix E, *infra.*) In eight there was some activity; in nine there was none. In *George Washington University v. Lyman,* Civil Action No. 2348-77, filed March 10, 1977, the same day this case was filed, plaintiff took no action for more than two years when it filed a request for discovery. Thereafter, its requests for a continuance were granted December 13, 1979, and May 14, 1980.

The decisions below thus raise the question of whether Rule 41(b) was applied to petitioners with a heavy hand. They raise the question not only of whether the discovery motion filed by petitioners on January 16, 1979, was frivolous but whether the motion was filed in good faith and, if so, whether petitioners were entitled to a determination of the motion on the merits prior to the *sua sponte* dismissal with prejudice. Petitioners were ready, able, and willing to go to trial on June 7, 1979, had the trial court denied their discovery motion for disclosure of Federal tax information.

Another question raised by the decisions below is whether *Link* authorizes the trial judge to deviate from the notice

requirement of Superior Court Civil Rule 41-I on an ad hoc basis and whether *Link* authorizes a *sua sponte* dismissal of a suit for the unintentional violation of an *oral* order of the trial judge.

Moreover, the important question presented on appeal but not addressed by the court below was whether *sua sponte* dismissal of the claim for an accounting is proper where the pleadings, depositions, and exhibits on file establish a prima facie case for an accounting based on the fiduciary relation existing between the parties and, thus, whether the trial court applied an erroneous legal standard in requiring a prima facie showing of fraud to support petitioners' Rule 56 motion for an accounting.[2] The prima facie showing of the fiduciary relation is reproduced in Appendix F, *infra.*

These questions, however, need not be reached by this Court unless Rule 41(b) of the Federal Rules of Civil Procedure and the identical Rule 41(b) of the Superior Court Civil Rules authorize *sua sponte* dismissals with prejudice without notice and an opportunity to be heard and without due consideration of whether a lesser sanction would be proper under the circumstances.

The dissenting judge in the court below believes that a lesser sanction is appropriate in the absence of actual prejudice to the respondents. Appendix B, *infra,* at 4b.

---

[2]In the District of Columbia, the mere showing of a fiduciary relationship between the parties constitutes a prima facie case for an accounting. *Rosenak v. Poller,* 110 U.S. App. D.C. 205, 206, 290 F.2d 748, 749 (1961), citing with approval *Cafritz v. Corp. Audit Co.,* 60 F. Supp. 627, 631 (D.D.C. 1945). Petitioners argued below that proof of the alleged fraud had absolutely nothing to do with their right to an accounting based on the fiduciary obligation of the respondents as Church trustees. 1 C.J.S. *Accounting* §19 (1936) (Cum. Supp. 1980).

REASONS FOR ALLOWANCE OF THE WRIT

1. The court below departed from the accepted and usual course of judicial proceedings on appeal—which calls for this Court's power of supervision—*first,* by its failure to review an important question of law preserved and presented for appellate review, *viz.*, whether, in the absence of a showing of fraud,[3] the pleadings, admissions, depositions, and exhibits on file established on March 7, 1978, [prior to the running of the 9-month period of inactivity relied on below for the dismissal for failure to prosecute] the existence of a fiduciary relation between the petitioners and the respondents and, thus, a prima facie case for an accounting;[4] and, *secondly,* by its sanctioning of the Superior Court's *sua sponte* dismissal of petitioners' suit with prejudice without notice and hearing in violation of Superior Court Civil Rule 41-I.

---

[3]Fraud constitutes a basis for an accounting which is separate and distinct from an accounting based on the fiduciary relation existing between the parties. 1 C.J.S. *Accounting* §20 (1936) (Cum. Supp. 1980).

[4]In the statement of issues presented for review by the court below (*Brief for the Appellants,* p. 1), issue 1 was: "Where a suit by church members, attendants, and regular contributors against the trustees for an accounting for church funds collected and disbursed alleges that a fiduciary relation exists between the parties, and the trustees admit the existence of the alleged fiduciary relation either expressly or by the failure to deny allegations of said relationship, did the trial court err in denying the motion for an accounting?"

For the purpose of affording notice and an opportunity to be heard on the record prior to dismissal of a cause with prejudice, Superior Court Civil Rule 41-I, set forth in full above, provides for dismissal *without* prejudice if a party fails for six consecutive months to take action and for written notice to the dilatory party at the end of the fifth month. Petitioners had the right to rely on the rule.

But there was no consecutive 5-month period of inactivity on the part of the petitioners in prosecuting their claim as shown in the above statement, pp. 7-8. *See Vina v. Hub Electric Co.*, 480 F.2d 1139 (7th Cir. 1973), holding that the sua sponte dismissal constitutes abuse of discretion where the trial court, relying on *Link*, failed to follow its own Local Rule 21(a)—which is similar to Superior Court Civil Rule 41-I—and the inactivity period was less than six months.

Procedural due process required the trial judge to give specific written notice of his intention to dismiss with prejudice *sua sponte* petitioners' suit for an accounting, but he was indifferent to this requirement. *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280-281 (9th Cir. 1975). *See Bautista v. Concentrated Employment Program of the Department of Labor*, 459 F.2d 1019 (9th Cir. 1972), where the clerk issued a show cause order pursuant to local rule, and the case was dismissed after two hearings.

2. The courts below decided this case in a way which does not accord with *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1961).

In *Link*, the lower courts rested on the "entire history of the case" in which plaintiff's dilatoriness over a 6-year period was well documented. 370 U.S. at 634-635, notes 2 and 11. There, the trial court, on its own initiative, gave

notice pursuant to its Local Rule 11 (now Local Rule 10) promulgated to implement Rule 41(b) of the Federal Rules of Civil Procedure, that the cause would be dismissed. A hearing was held on the show-cause order and the court set the case down for trial. The trial was continued and the court mailed a notice to counsel scheduling a pretrial conference. Plaintiff's counsel did not attend and gave a lame excuse for his nonappearance whereupon the court dismissed the case with prejudice. 370 U.S. at 628-629.

Here, no notice whatsoever was given petitioners despite the notice requirement of the Superior Court's own Civil Rule 41-I, set forth in full above, p. 4.

3. The decision below, affirming the *sua sponte* dismissal of this case without notice and an opportunity to be heard either before or after such dismissal conflicts with the decisions of Article III courts and the practice in the Article I courts.

The court's *inherent* power to dismiss *sua sponte* is necessarily limited by the Due Process Clause and the Federal Rules decisions, under which Federal courts are required, in view of "the sound public policy of deciding cases on their merits," to balance considerations of sound judicial administration by applying four criteria, *viz.*,

(1) the degree of personal responsibility on the part of the plaintiff;
(2) the amount of prejudice to the defendants caused by the delay;
(3) the presence or absence of "a drawn out history of deliberately proceeding in a dilatory fashion";
(4) the effectiveness of sanctions less drastic than dismissal.

The settled rule is that only on "rare occasions" should the trial judge "deprive the languid litigant of his right to a trial

on the merits." *See Chira v. Lockheed Aircraft Corp.*, ____ F.2d ____ , 30 FR Serv2d 576 (2d Cir. 1980). Thus, in applying the above-stated criteria, Article III courts have found the dismissal with prejudice of claims for failure to prosecute to be an abuse of discretion in the following circumstances:

a. *Reizakis v. Loy,* 490 F.2d 1132 (4th Cir. 1974), where, as here, the events that took place during the period of inactivity were not considered on the record; where plaintiff's local counsel withdrew and was not replaced until five days before the trial; where new counsel's motion for a continuance was denied and he thus declined to enter a formal appearance and failed to subpoena witnesses; and where, on the day of trial, his motion for continuance was denied and defendant's motion to dismiss for failure to prosecute was granted.

b. *Saylor v. Bastedo,* 623 F.2d 230 (2d Cir. 1980), where, as here, the trial court failed to give "adequate notice" prior to dismissal with prejudice in a case involving a 7-year delay. And *see Glo Co. v. Murchison & Co.,* 397 F.2d 928 (3d Cir. 1967), *cert. denied,* 393 U.S. 939 (1968), involving a 12-year delay.

c. *Gonzalez v. Firestone Tire & Rubber Co.,* 610 F.2d 241 (5th Cir. 1980), where as here, the dismissal was not supported by a clear record of deliberate delay or "significant periods of inactivity"; where there was no finding that a lesser sanction would not serve the interests of justice; and where, as here, the trial court "did not initiate any action to obtain compliance with its order prior to entering the dismissal with prejudice."

d. Where, as here, the delay was due to simple negligence rather than "gross negligence amounting to a 'total

dereliction of professional responsibility' " and "a conscious disregard of court orders." *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979); *Marks v. San Francisco Real Estate Board*, ____ F.2d ____, 30 FR Serv2d 582 (9th Cir. 1980); *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

e. *Dove v. Codesco*, 569 F.2d 807 (4th Cir. 1978), where the delay was due to a number of minor defaults, such as the failure of local counsel to familiarize herself with local rules and practice, and thus her failure to notify nonresident counsel of pretrial conferences, and her failure to attend pretrial conferences, but without evidence of deliberate delay.

f. *Peterson v. Term Taxi, Inc.*, 429 F.2d 888, 891 (2d Cir. 1970), where the circumstances of the delay "demonstrate a failure of good judgment" on the part of the plaintiff and his attorney and their conduct "was an affront to the court," but where affidavits explained the mixup in communication between plaintiff and his attorney, because: "A court must not let its zeal for a tidy calendar overcome its duty to do justice."

Although not applied by the courts below, the foregoing standards of Rule 41(b) of the Federal Rules of Civil Procedure should govern involuntary dismissal for failure to prosecute as they do in other Article I courts of the United States. *Ct. Cl. R.* 102(b); *Tax Ct. R.* 123(b); *Cust. Ct. R.* 8.3(b).

3. Finally, as indicated above, the petitioners had the right to have the court below to pass upon the questions of law and fact presented—other than the Rule 41(b) question—to wit:

a. Whether the pleadings, admissions, depositions and exhibits on file on March 7, 1978, establish the existence of a

fiduciary relation between petitioners and respondents and, thus, a prima facie case for an order to account; and

b. Whether petitioners' pretrial discovery motion to compel disclosure of the Church's payroll tax returns and tax return information was filed in good faith and, if so, whether petitioners were entitled to a determination of the motion on the merits prior to the *sua sponte* dismissal under Rule 41(b).

This Court has held that, where the court below fails to determine an issue properly raised in the pleadings or on appeal, it is appropriate and good practice to reverse or vacate the judgment and remand the case for determination of the undetermined issue. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611-612 (1975); *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 140-141 (1969), and *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 (1967).

CONCLUSION

In view of the foregoing reasons and the reason set forth in the opinion of the dissenting judge below (Appendix, p. 4b, *infra*), petitioners respectfully submit that their petition for review by certiorari be granted, that the judgment below should be vacated and the case remanded to the District of Columbia Court of Appeals for consideration of the issues properly raised but not decided on appeal.

Respectfully submitted,

CHARLES E. WILLIAMS
Attorney for Petitioners
1329 Shepherd Street, N. W.
Washington, DC 20011

June, 1981

CERTIFICATE OF SERVICE

I certify that four copies of the foregoing petition were served upon counsel of record for the respondents, Blaine P. Friedlander, Esq., Suite 309, Mosby Building, 10560 Main Street, Fairfax, VA 22030, by certified mail No. P02 6100050 on June 19, 1981.

CHARLES E. WILLIAMS
Attorney for Petitioners

APPENDIX A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

WILLIAM BELCHER, et al., Plaintiffs,	) Civil Action) No. 2388-77
v.	)
AULIN JOHNSON, et al., Defendants.	) Specially) Assigned) Judge Hannon

ORDER

Plaintiffs' amended complaint for an accounting was filed June 20, 1977, on behalf of themselves and all other similarly situated members of, and regular contributors to, the Mount Jezreel Baptist Church [hereinafter "Church"], a religious society incorporated under the laws of the District of Columbia in 1883. Named as defendants are the Pastor of the Church, who has served in that capacity since 1967, and several persons who served as trustees of the Church in different periods of time from January 1, 1967, through September 30, 1976.

Plaintiffs allege that during these years defendant trustees, aided by the Church's Pastor, breached their fiduciary duties in that they: (1) converted Church funds to their personal use; (2) refused to obey the congregation's voted mandate that the Church's books of account be submitted to a professional audit; (3) refused to make the Church's books of

account available to the congregation for inspection at reasonable times; (4) failed to comply with Internal Revenue Service Regulations respecting the Church's operation of a licensed day care center; (5) failed to account for income, expenses, assets liabilities and net worth of the Church.

Plaintiffs' prosecution of this action has been fraught with delays for which no good cause can be shown. Fourteen months have passed since the Court first admonished counsel for plaintiffs for tardiness in obeying this Court's orders. And it appears that in the interim plaintiffs have done nothing to bring this action into a position of readiness for trial.

The history of this case reflects that after the complaint was filed on June 20, 1977, the matter came on for a status hearing on July 5, 1977. At that time a discovery schedule was agreed to and the matter continued to August 10, 1977, for a further status hearing. On that date a deposition schedule for plaintiffs was authorized by the Court to the end that the matter was continued to October 27, 1977, for further status consideration.

On this latter date the Court ruled on plaintiffs' motion to produce documents and consistent with plaintiffs' wishes authorized them to file a motion for summary judgment within two weeks. Defendants were to respond within 10 days of the filing of the motion for summary judgment. At the same time, the Court fixed February 22, 1978, as the pre-trial date, with a back-up trial date of March 1, 1978, and a fixed trial date of June 7, 1979.

The pre-trial hearing was held on February 22, 1978, at 4:30 p.m. At that hearing a number of things occurred. One was that this Court observed that plaintiffs' motion for summary judgment was not accompanied by a statement of undisputed material facts as required by the rules of this

Court. For this reason and for the further reason that genuine issues of material fact existed the Court denied plaintiffs' motion for summary judgment by order of March 7, 1978. In addition, this Court noted that in order that the late filing by plaintiffs of their pre-trial statement and their motion for summary judgment had placed an awesome burden on defendants' attorney to file defendants' pre-trial statement and their opposition to the motion for summary judgment in a timely fashion.

It was clear on February 22, 1978, that plaintiffs sought summary judgment against three of the trustees for the period of January 1, 1967, through September 30, 1976, and yet plaintiffs had not set forth either in their pretrial statement or their motion for summary judgment even a *prima facie* basis for an accounting against these three trustees for the period January 1967 to the date of the pre-trial hearing. Plaintiffs requested the Court to refer the entire matter to the auditor. In the absence of a *prima facie* showing of wrongdoing on the part of trustees this Court refused to send the matter to the auditor. The Court directed plaintiffs to file with the Court in record fashion their contentions of wrongdoing respecting each of the trustees and the period of time plaintiffs contended each trustee was responsible for. To date, plaintiffs have failed to comply with this oral order of the Court. Moreover, in the aforementioned opinion and order of March 7, 1978, the Court set forth some of the material issues which the Court deemed to be in dispute in connection with plaintiffs' motion for summary judgment and ordered counsel for the parties to pursue discovery and promptly to file motions so as to bring about a resolution of these issues. Notwithstanding this order, plaintiffs did nothing for nine months, at which time on January 16, 1979, they filed a totally frivolous motion seeking an order compelling de-

fendants to disclose federal tax returns and tax return information.[1] The Court finds plaintiffs' lack of diligence in this regard to be again inexcusable.

Plaintiffs' belated and questionable pursuit of discovery precedes their resolution of matters at the threshhold of this litigation. At the pre-trial hearing on February 22, 1978, the Court informed plaintiffs' attorney that he was seeking to pursue this action as a class action suit and yet plaintiffs had not filed a motion to certify the case as a class action. Plaintiffs' attorney was directed to file such a motion and to date he has not successfully done so.[2]

In addition to the foregoing, since serious challenge was made to some of the plaintiffs' standing to sue as Church members and as representatives of the class and since as well there was serious doubt regarding whether the named trustees were fiduciaries over the entire 10-year period, the case was removed from the trial calendar by oral order of the Court on February 22, 1978, at the pre-trial hearing and was not restored to the trial calendar until plaintiffs could get their house in order and the matter was ripe for trial. Plaintiffs have not as yet presented their case as to each

---

[1]It appears from the record matter herein that defendants have already made available all tax records which plaintiffs desire (see defendants' opposition for an order compelling defendants to consent to a disclosure of federal tax returns and tax return information).

[2]On March 15, 1978, plaintiffs filed a motion seeking to have this action certified as a class suit, but failed to include within their motion an adequate statement concerning notice to the class as required by SCR Civ. 23-I-(c)(1).

trustee in such a fashion as to warrant referral of the action to the auditor.[3]

It is well settled that a defendant can move for the dismissal of an action where a plaintiff has failed to prosecute or comply with any order of the Court. SCR Civ. 41-(b). However, to impose such a sanction the Court need not await defendant's motion. See, *e.g.*, *Cage v. Cage*, 74 F.2d 377 (5th Cir. 1934); *Carnegie National Bank v. City of Wolf Point*, 110 F.2d 569 (9th Cir. 1940); *Hicks v. Bekins Moving & Storage Co.*, 115 F.2d 406 (9th Cir. 1940); *Zelinski v. United States*, 120 F.2d 792 (2d Cir. 1941); *American National Bank & Trust Co. v. United States*, 142 F.2d 571 (D.C. Cir. 1944); *Shotkin v. Westinghouse Elec. & Mfg. Co.*, 169 F.2d 825 (10th Cir. 1948); *Slavitt v. Meader*, 278 F.2d 276 (D.C. Cir. 1960). In *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1961), the United States Supreme Court construed Federal Rule of Civil Procedure 41(b), upon which this Court's identical rule is based. Writing for the majority, Justice Harlan stated therein:

> Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of the courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power", governed not by rule or statute but by the control

[3]Moreover, the Court would note in passing that plaintiffs waited a decade to seek an equitable remedy for what they allege was a continuous course of wrongful conduct. Plaintiffs acquiesced to defendants management of the Church's fiscal affairs. Therefore, it appears that the doctrine of *laches* would be a substantial defense to this action.

> necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent . . . from the many state decisions sustaining such dismissals . . . (at 631).

In this jurisdiction, the Municipal Court of Appeals for the District of Columbia held in *Steele v. General Baking Co.*, D.C. Mun. App., 101 A.2d 845 (1954), that it was the duty of every plaintiff to be diligent in pursuing his remedies and in expediting his cause to a final determination. Judge Quinn therein acknowledged the lower court's inherent power to dismiss for plaintiff's lack of diligence and further concluded: "A party should not be forced to defend himself against a claim which arose more than three years ago, when with little effort on the plaintiff's part the case could have been adjudicated within a few months." *Id.*, at 846.

This Court likewise concludes that a little effort on plaintiffs' part would have brought a speedy adjudication of this action. Accordingly, it appears to the Court that plaintiffs have failed to comply with this Court's orders, as noted herein, and it further appears that despite this Court's admonition to avoid delays, plaintiffs have shown no diligence in prosecuting this action.

WHEREFORE, it is by the Court this 11th day of June, 1979,

ORDERED, *sua sponte,* that plaintiffs' amended complaint for an accounting be, and is thereby, dismissed; and it is

FURTHER ORDERED that plaintiffs' motion for an order compelling defendants to disclose federal tax returns and return information be, and the same hereby is, denied as moot.

/s/ Joseph M. Hannon
JOSEPH M. HANNON
JUDGE

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 79-1172

WILLIAM BELCHER, et al., APPELLANTS,
v.
AULIN E. JOHNSON, et al., APPELLEES.

Appeal from the Superior Court of the
District of Columbia
(Hon. Joseph Michael Hannon, Trial Judge)

(Argued June 24, 1980 Decided February 11, 1981)

Benjamin F. Amos for appellant.

Blaine P. Friedlander for appellee.

Before GALLAGHER, MACK, and FERREN, *Associate Judges.*

Dissenting opinion by *Associate Judge* MACK at page 4.

PER CURIAM: This case involved a suit for an accounting brought by members of the Mount Jezreel Baptist Church. The complaint was filed June 20, 1977. On June 11, 1979, the trial court sua sponte dismissed the complaint for failure to prosecute. This appeal resulted.

Normally a dismissal for failure to prosecute results from a motion filed by the opposing party. The Supreme Court in *Link v. Wabash Railroad Co.,* 370 U.S. 626 (1961) had this to say, however, on the matter of a sua sponte dismissal of this ground:

> Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its

policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent... from the many state court decisions sustaining such dismissals .... [*Id.* at 630-61 (footnote omitted).]

In entering its ruling, the trial judge here referred to an early opinion of this court in *Steele v. General Baking Co.*, D.C.Mun.App., 101 A.2d 845 (1954) which stated:

> A party should not be forced to defend himself against a claim which arose more than three years ago, when with a little effort on the plaintiff's part the case could have been adjudicated within a few months. [*Id.* at 846.]

The trial court in this case then stated:

> This Court likewise concludes that a little effort on plaintiffs' part would have brought a speedy adjudication of this action. Accordingly, it appears to the Court that plaintiffs have failed to comply with this Court's orders, as noted herein; and it further appears that despite this Court's admonition to avoid delays, plaintiffs have shown no diligence in prosecuting this action.

Our test on review is not whether we would necessarily have acted sua sponte to dismiss the complaint in the circumstances of this case but whether we conclude the trial court abused its discretion in so ruling. *Steele v. General Baking Co.*, supra at 846.

In this case, on March 7, 1978 the trial court set a "fixed trial date" for June 7, 1979 and ordered the parties to pursue discovery. Plaintiff-appellants took depositions on May 3 and 16, 1978, and again on October 13, 1978, but literally did nothing for the next nine months (whereupon the case was dismissed).

Appellants complain that their efforts for discovery were frustrated because appellees did not authorize inspection of church records, in contrast with day care center records, at the Internal Revenue Service. Assuming that the IRS did have such records, appellants did nothing to specify on the record what kinds of church documents at the IRS would have been helpful to their cause. Further, appellants should have filed a motion to compel discovery if defendants were, in fact, thwarting the court discovery order of March 7, 1978.

In addition, appellants did not comply with the Super.Ct. Civ. R. 23-I(c) (1) requirement of a statement concerning notice to the class. Appellants complain that appellees did not turn over a complete list of church members to permit such notice. Under the rule, plaintiffs could have saved their rights by including this complaint as part of the Rule 23 statement. Again, plaintiffs did not follow through.*

On this record, we are of the view that we should not go so far as to conclude there was an abuse of discretion.

Affirmed.

---

*It appears that appellant Williams lacks standing to participate in this suit, having been voted out of the church in 1967, and again refused membership in 1972 and 1976. Suit was filed in 1977.

MACK, *Associate Judge,* dissenting: Dismissal under Super. Ct. Civ. R. 41(b) is a harsh sanction—" 'a final and definitive doom' precluding a preferred disposition on the merits." *Taylor v. Washington Hospital Center,* D.C. App., 407 A.2d 585, 590 (1979) *citing Garces v. Bradley,* D.C.App., 299 A.2d 142, 144 (1973). We have suggested that a trial court is well-advised to consider applying a lesser sanction and that an appellate court may well find an abuse of discretion where there has been no showing that a defendant actually would be prejudiced by the delay. *See Taylor, supra* at 590. On the state of the record here—the absence of a showing of prejudice to the defendant, and the existence of activity, however abortive, I think dismissal sua sponte was inappropriate and an abuse of discretion.

APPENDIX C

District of Columbia
Court of Appeals

No. 79-1172

WILLIAM BELCHER, ET AL.,

Appellants,

v. CA 2388-77

AULIN E. JOHNSON, ET AL.,

Appellees.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Harris, *Mack, *Ferren, Pryor, Associate Judges; and *Gallagher, Associate Judge, Retired.

O R D E R

On consideration of appellants' petition for rehearing en banc, and it appearing that no judge has called for a vote on the petition, it is

ORDERED that appellants' petition for rehearing en banc is hereby denied.

PER CURIAM.

(* - denotes merits division)

APPENDIX D

RULE 40-II March 1, 1978

SUPERIOR COURT OF D. C. - CIVIL RULES

RULE 40-II

CERTIFICATION AND ASSIGNMENT OF CASES TO CIVIL I BRANCH

(a) DESIGNATION OF CIVIL I CASES. It shall be the responsibility of the Civil Screening Judge to certify cases to the Civil I Branch. Certification of cases to the Civil I Branch may be considered:

(1) Upon the initiative of the Civil Screening Judge;

(2) Upon the recommendation of a screening committee of Civil Division personnel;

(3) Upon the written motion filed by counsel for any party;

(4) Upon the recommendation of any judge assigned to the Civil Division; or

(5) Upon the recommendation of the Civil Motions Commissioner.

(b) FACTORS CONSIDERED. In certifying a case to the Civil I Branch, the Civil Screening Judge may consider the estimated length of trial; the number of witnesses that may appear; the number of exhibits that may be introduced; the nature of the factual and legal issues involved; the extent to which discovery may require supervision by the court; the number of motions that may be filed in the case; or any other relevant factors.

(c) DISTRIBUTION OF CIVIL I CASES. The Clerk of the Civil Division shall randomly distribute to the judges

assigned to the Civil I Branch those cases that have been certified to that Branch.

(d) ASSIGNMENT TO JUDGE. All proceedings in a case after its assignment to the Civil I Branch shall be scheduled and conducted by the judge to whom the case is assigned, except as otherwise provided in these rules. Upon the termination of an assignment of a judge to the Civil I Branch, the chief judge shall designate the judge or judges to whom the cases on the calendar of the former Civil I judge shall be reassigned.

(e) PROCEDURE. After the parties have been notified that a case has been assigned to a Civil I judge, the parties shall place the assigned judge's name below the civil action number on all papers filed in the case. In addition, all papers in the case, except motions, shall be filed in the Civil Clerk's Office. Motions shall be filed in the Civil Motions Commissioner's Office. A copy of all pleadings and papers shall be delivered by the parties to the chambers of the Civil I judge on the day of filing.

(f) SPECIAL ASSIGNMENTS. Nothing in this rule shall be construed to abrogate the authority of the chief judge to make special assignments under Civil Rule 40-I(f).

COPYRIGHT, 1978

APPENDIX E

1977 Cases Still Pending in Superior Court

Case No., Name, Type & Inactivity Period	Plaintiff's Prosecutorial Activity
2306-77 filed 3-9-77 *Parker v. Martin* (promissory note); 47 months of inactivity since 4-12-79	None since filing of answer & counterclaim 6-23-77
2312-77 filed 3-9-77 *Reliable Stores Corp. v. Jenkins* (goods sold and delivered); inactive 50 months	None
2348-77 filed 3-10-77 *GWU v. Lyman* (debt); inactive 29 months before 8-30-79; inactive 12 months after 5-14-80	Plaintiff's request for discovery filed 8-30-79; its requests for continuance granted 12-13-79 & 5-14-80
23688-77 filed 3-10-77 *Jones v. ABC Supply Co.* (negligence); inactive 44 months	None: (discovery by defendant 3-31-77 & 8-25-77)
2382-77 filed 3-10-77 *Contex, Inc. v. Penn* (money due); inactive 50 months	None

2383-77 filed 3-10-77 *National Bank of Washington v. Lay* (promissory note); inactive 50 months	None
2394-77 filed 3-11-77 *W & J Sloane, Inc. v. Kelley* (debt); inactive 50 months	None
2397-77 filed 3-11-77 *Akinshiku v. Swinson;* inactive 50 months	None; (discovery by defendant 7-8-77, 12-6-77 & 11-6-78)
2399-77 filed 3-11-77 *Baghini v. Warren* (negligence); inactive 50 months	None
2400-77 filed 3-11-77 *Hardy v. Haggins* (specific performance); inactive 50 months	None
2402-77 filed 3-11-77 *Campbell v. Campbell* (foreign judgment); inactive 46 months before 2-25-81	Notice of deposition filed 2-25-81; motion for leave to file an amended complaint filed 4-9-81
2407-77 filed 3-11-77 *Chadwick v. Faison* (damages); inactive 50 months	None

2410-77 filed 3-11-77 *Catterton Co. V. Studnickey* (debt); inactive 50 months	None
2411-77 filed 3-11-77 *American Express v. Boggs* (goods sold and delivered); inactive 46 months	Deposition filed 7-11-77
2424-77 filed 3-11-77 *Brown v. Cullinane* (conversion); inactive 49 months	None; (answer filed 4-7-77)
2960-77 filed 3-25-77 *Md. Indemnity Ins. Co. v. Holmes* (negligence); inactive 34 months	(Discovery by defendant 11-25-77; deposition filed by plaintiff 7-11-78
12313-77 filed 12-13-77 *Gurley v. Reese* (breach of warranty); inactive 25 months since 4-12-79	Answer to counterclaim filed 5-26-78; plaintiff fied answers to interrogatories 11-24-78; (defendant's deposition of plaintiff filed 4-12-79)

APPENDIX F

Proof of Fiduciary Relation
(Plaintiffs' Motion to Vacate the June 11, 1979, Order, Record, 893)

* * * *

The complaint in this case alleges the existence of a fiduciary relationship between the parties hereto, which has been admitted, to wit: The defendant-trustees admit paragraph 4 of the complaint which alleges: "Defendants Aulin E. Johnson, chairman, Balis A. Dunlap, Jr., vice-chairman, Andrew T. Fleming, Nelson C. Malone, and William Swann have been trustees since January 1, 1967." Moreover, the defendant-trustees admit, by their failure to deny paragraph 5 of the complaint, that:

> At all times during the years 1967 through 1976, it was the duty of the defendant-trustees to diligently, honestly, and carefully administer the financial affairs of the Church; to see that the property and funds were not wasted, stolen, or squandered; to make and publish true, accurate, and complete financial reports and statements of the secular affairs of the Church from time to time; and to faithfully and diligently perform all other duties devolving upon them as trustees of the Church.

Defendants also admit the first sentence of paragraph 9 of the complaint that on January 20, 1977, plaintiffs' demand for an accounting was made upon each of the defendant trustees named in the complaint; and by their failure to deny the last sentence of paragraph 9, they admit that "the request for an accounting was entirely futile and unavailing." While denying "the allegations of wrongdoing" in the exhibit of the complaint (plaintiffs' demand upon the trustees for an

accounting), defendants, however, failed to deny the allegations therein with respect to their fiduciary obligation and thus admit: (1) that plaintiffs consistently requested annual statements of assets, liabilities and net worth of the Church but none was made during the entire 10-year period since the 1966 audit report was filed; (2) that plaintiffs have not received complete, accurate, verified reports of annual receipts and disbursements but have been given incomplete, unsigned fragmented reports of income and expenses with inherent discrepancies; (3) that none of the financial reports filed by defendants reflects that the defendant-pastor repaid the loan to the Church of $5,000.00; (4) that the Church by a unanimous vote ordered an audit examination of the Church's books of account, but the report of the audit committee appointed by defendant Trammell to implement the Church's order was suppressed; (5) that the defendant-trustees failed and refused to submit the books of account to a professional audit examination as required by the unanimous order of the Church and the report of the Church's audit committee; (6) that such conduct of the defendant trustees constitutes a breach of the fiduciary obligation to the congregation; (7) that defendants failed to tell the congregation that payroll taxes of $40,019.77 had been assessed against the Church's day care center; and (8) that plaintiffs' requests for full disclosure of the delinquent tax liability and measures for settlement thereof have been ignored.

Failure of the defendant-trustees to deny the allegations of paragraph 5 and the first and last sentences of paragraph 9 of the complaint, as well as the above-stated matters in the exhibit thereof incorporated therein by reference, constitutes an admission of said matters, particularly since all are obviously matters of which defendants have knowledge.

Superior Court Rule 8(d). *See Campbell v. Campbell,* 83 U.S. App. D.C. 237, 170 F.2d 809 (1949), and *Shakman v. Democratic Organization of Cook County,* 533 F.2d 344 (7th Cir.), *cert. denied,* 429 U.S. 858 (1976), construing *Fed. R. Civ. P.* 8(d), the language of which was adopted in Superior Court Rule 8(d).

Hiscox, *The New Directory for Baptist Churches,* and *Robert's Rules of Order* form the basis of the discipline of the Mt. Jezreel Baptist Church, and the defendants have so agreed. See paragraph 2 of exhibit B of the supporting affidavit of plaintiff Lorraine A. Williams. The portions of Hiscox upon which the defendant-trustees rely, in admitting (in paragraph 10 of the answer) the existence of the fiduciary relation between the parties, provide:

> [T]rustees are elected, as required by law, according to specified procedure, in order to legally hold property and rightfully to administer its [the Church's] financial affairs. [Hiscox, *The New Directory for for Baptist Churches* 116. *See D.C. Code Ann.* § § 29-508, 29-509.]
>
> [T]he trustees should hold themselves bound by every consideration of morality and honor to carry out the wishes of the Church and to act under their [sic] instructions whatever technical rights the civil laws and decisions of courts may give them in certain emergencies. [Id. at 117, note 2.]
>
> Trustees, as having to transact business matters, should be sound, careful, and accurate business men. [Id. at 118, note 6.]
>
> * * * *

Office-Supreme Court, U.S.
FILED
JUL 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS, on behalf of themselves and on behalf of the congregation of the MT. JEZREEL BAPTIST CHURCH, a District of Columbia corporation,

Petitioners,

v.

AULIN E. JOHNSON, BALIS A. DUNLAP, JR., GEORGE A. BROWN, JOHN A. DAVIS, ANDREW T. FLEMING, ROBERT HAIGLER, NELSON C. MALONE, YVONNE SMITH, ELDRIDGE SPEARMAN, WILLIAM SWANN and BERNARD A. WADE, individually and as trustees of the MT. JEZREEL BAPTIST CHURCH, and HAROLD E. TRAMMELL, pastor,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BLAINE P. FRIEDLANDER
10560 Main Street
Suite 309, The Mosby
Fairfax, Virginia 22030
(703) 385-2700

Counsel for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Was there an abuse of judicial discretion where the trial court, *sua sponte* dismissed the petitioners' case upon a finding that the petitioners had made no showing of wrongdoing or that petitioners represented the alleged class upon repeated informal requests and an order of court to make such a showing?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
COUNTERSTATEMENT OF THE CASE	1
REASON FOR DENIAL OF WRIT	3
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	PAGE
Anderson National Bank v. *Luckett*, 321 U.S. 233 (1944)	4
California Diversified Promotions, Inc. v. *Musik*, 505 F. 2d 278	4
Link v. *Wasbash Railroad* 370 U.S. 626 (1961)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2160

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS, on behalf of themselves and on behalf of the congregation of the MT. JEZREEL BAPTIST CHURCH, a District of Columbia corporation,

Petitioners,

v.

AULIN E. JOHNSON, BALIS A. DUNLAP, JR., GEORGE A. BROWN, JOHN A. DAVIS, ANDREW T. FLEMING, ROBERT HAIGLER, NELSON C. MALONE, YVONNE SMITH, ELDRIDGE SPEARMAN, WILLIAM SWANN and BERNARD A. WADE, individually and as trustees of the MT. JEZREEL BAPTIST CHURCH, and HAROLD E. TRAMMELL, pastor,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

COUNTERSTATEMENT OF THE CASE

Petitioners, together with five others, by and through their attorney, filed the instant action on March 10, 1977 under the style of *William Belcher, et al.* v. *Aulin Johnson, et. al.*, Civil Action 2388-77. Petitioners and those with whom they were associated claimed to represent a class, the similarly situated members of Mt. Jezreel Baptist Church.

Petitioners claimed respondent trustees, aided by the respondent pastor breached their judiciary duties by converting church funds to their personal use, refusing to have the books professionally audited, refusing to make the Church's books of account available to the congregation for inspection, failing to comply with Internal Revenue Service Regulations and failing to account for the income of the Church.

After issue was joined and the case specially assigned for expeditious handling, the parties met for a status hearing on July 5, 1977. A discovery schedule was agreed upon and the matter continued until August 10, 1977.

When it appeared the petitioners' discovery had not been completed by August 10, 1977 a further deposition schedule was agreed to and the matter continued until October 27, 1977.

At the hearing on October 22, 1977, petitioners sought and were granted permission to file a motion for summary judgment within two weeks, with respondents' reply within 10 days from filing. The court assigned February 22, 1978 as the date for pre-trial with trial tentatively scheduled on March 1, 1978 and a permanent trial date of June 7, 1979.

At the pre-trial on February 22, 1978 it was evident the petitioners had delayed the filing of their motion for summary judgment and pre-trial statement until the last moment placing upon the respondents "an awesome burden". (Pet. App. 6a)

Petitioners were not prepared for trial and the March 1, 1978 trial date was not used. On March 7, 1978 the trial court, in an order, noted the delays caused by petitioners, and failure to set forth undisputed

material facts in their motion for summary judgment as required by the Court's Rules and denied their motion. The court also directed the petitioners, as a part of the record, to detail any the specific contention of wrong doing respecting each respondent. The court ordered the parties to complete discovery. (Pet. App. 2a-3a)

Respondents, their discovery completed, awaited action by the petitioners. None was forthcoming. On February 16, 1979 petitioners filed a "totally frivolous" motion requiring respondents to disclose tax returns and information related thereto, despite the fact that all such information had been made available by the Internal Revenue Service and respondents. (Pet. App. A)

On June 11, 1979, four days after the second trial date was passed by, the trial court, *sua sponte*, entered an order dismissing this matter and denying petitioner's motion to disclose tax returns stating "a little effort on plaintiffs' part would have brought a speedy adjudication of this action." (Pet. App. 6a)

On October 17, 1979 petitioners filed a motion to vacate the dismissed order, which motion was denied. (Pet. 8)

Petitioners thereupon appealed the decision, which judgment was affirmed by a panel of the District of Columbia Circuit of Appeals on February 11, 1981. A petition for rehearing was denied on March 24, 1981. (Pet. 8)

This writ then followed, with the petitioners herein only two of the original seven.

REASONS FOR DENIAL OF WRIT

1. *There was no denial of due process.* While the respondents did not move the Trial Court to dismiss this action, we support the Trial Court's actions. We, too,

had recognized the lack of substance to petitioners' case and were of the belief that at the time of trial petitioners' case would fail for lack of proof and we would be spared the appeals. We do recognize in our reading of the Trial Court's Dismissed Order, its frustration with petitioners who would not prepare their case (Pet. App. A). The petitioners' argument that they were entitled to notice and a hearing before the dismissal on June 11, 1979 ignores the fact that the court had given notice in the form of an order on March 7, 1979 and the lengthy discussion of the case during pre-trial on February 22, 1979.

It is clear the "fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank* v. *Luckett*, 321 US 233 (1944). This very fundamental rule was cited by petitioners' main case upon this point, *California Diversified Promotions, Inc.* v. *Musik*, 505 F. 2d 278.

The petition seeks to persuade this Court that in all cases one must be afforded a hearing before any court takes action. This is not the case. If this is so then every applicant before this Court would be so entitled. Common sense tells us that there are times when courts may act *sua sponte*. This case is such a matter. Petitioners filed their complaint couched in general language on March 10, 1977. On February 22. 1978, with a subsequent order on March 7, 1978 petitioners were required to come forth with particulars giving substance to their claim. Instead they came forward with a request for additional discovery on January 16, 1979 (a year later). The record is clear. The judge had a right to act *sua sponte*. We submit the pleadings suggested by the peti-

tioners are adequate to safeguard their rights. The real question is not a violation of Constitutional rights but whether the trial court abused its discretion.

2. The trial court followed *Link* v. *Wabash Railroad* 370 US 626 (1961). Justice Harlen, speaking for the majority in *Link*, supra, was most explicit. A trial court has the right, acting on its own initiative, to clear its calendars of cases remaining dormant because of the conduct of the parties seeking relief. According to *Link*, supra, this is an "inherent power" required to manage the court's affairs.

The fact is apparent from the petition filed herein that petitioners filed a complaint on March 10, 1977, at a time they were not prepared to go forward. They refused to prepare their case nor could they state their cause of action when ordered by the Court on March 7, 1978. When they had failed to comply with the order of court over a year later, June 11, 1979, the cause was dismissed.

Even as of this date they have not made any submission evidencing compliance with the order. They are still maintaining that all they must show is an allegation. This Trial Court found insufficient.

3. *The Trial Court did not abuse its discretion.* Petitioners seemingly argue the failure of the Trial Court to grant a hearing prior to the *sua sponte* dismissal in an abuse of discretion, but does not set forth their arguments clearly. It is true that criteria are set forth, but it is not made clear how the petitioners are to avoid the consequences of their own lack of action nor, indeed, their lack of a case.

This entire matter is predicated upon petitioners' erroneous perception that their wishes to find evil among the defendants must necessarily be followed by a joint effort by the court and respondents to supply the proof. We should like to oblige, and did respond for from 1977 and 1978 by allowing the petitioners to spend two days reviewing all of our bank statements, checks and other financial material; by working with Internal Revenue and having even material in dead files available; and the taking of tedious depositions. Nothing indicating any misconduct on the part of any defendant was found, or this Court may be assured the petitioners would have made that fact known.

Petitioners maintain they act on behalf of the congregation. It is interesting to note that only two of the original seven plaintiffs bring this action. It is also to be noted that since 1977 petitioners did not make any effort to proceed with their class action other than a motion filed on March 11, 1978, four days after the court order demanding that the case be set forth. The motion was not correctly presented and was denied. Petitioners do not allege the court below was in error in denying the motion to certify.

There is nothing in this record to suggest the granting of this petition. There is not a significant federal question nor are there any rights needing protection. This is a matter of the petitioners refusing to perceive their theory of action cannot be proved.

CONCLUSION

In view of the foregoing reasons and the reasons set forth in the opinions below, respondents respectfully submit that the petition for review by certiorari be denied.

Respectfully submitted,

BLAINE P. FRIEDLANDER
10560 Main Street
Suite 309, The Mosby
Fairfax, Virginia 22030

Attorney for Respondents

June, 1981

CERTIFICATE OF SERVICE

I certify that four copies of the foregoing opposition to petition were served upon counsel of record for the petitioners, Charles E. Williams, Esq., 1329 Shepherd Street, N.W., Washington, D.C. 20011, Postage prepaid by first class mail on July 20, 1981.

BLAINE P. FRIEDLANDER
Attorney for Petitioners

Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2160

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS, on behalf of themselves and on behalf of the congregation of the MT. JEZREEL BAPTIST CHURCH, a District of Columbia corporation,

Petitioners,

v.

AULIN E. JOHNSON, BALIS A. DUNLAP, Jr., GEORGE A. BROWN, JOHN A. DAVIS, ANDREW T. FLEMING, ROBERT HAIGLER, NELSON C. MALONE, YVONNE SMITH, ELDRIDGE SPEARMAN, WILLIAM SWANN and BERNARD A. WADE, individually and as trustees of the MT. JEZREEL BAPTIST CHURCH, and HAROLD E. TRAMMELL, pastor,

Respondents.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI

CHARLES E. WILLIAMS
1329 Shepherd Street, N.W.
Washington, D.C. 20011
Counsel for Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF AUTHORITIES

Page

Cases:

Barney v. IRS,
618 F.2d 1268 (8th Cir. 1980) 3

Bouldin v. Alexander,
15 Wall. (82 U.S.) 131 (1873) 7

Browning Debenture Holders Committee v. DASA Corp., 605 F.2d 35 (2d Cir. 1978) 3

Kelley v. United States,
536 F.2d 897 (9th Cir. 1976) 3

McBryde v. Amoco Oil Co.,
404 A.2d 201 (D.C. App. 1979) 6

Public Citizen v. Lockheed Aircraft Corp.,
565 F.2d 708 (D.C. Cir. 1977) 9

Sibron v. New York,
392 U.S. 40 (1968) 5

Statutes:

D.C. Code Ann. §11-921(a)(6) 8

D.C. Code Ann. §§29-501 thru 29-516 8

Books:

66 AM. JUR.2d, *Religious Societies* §§5, 9, (1973) 7

Hiscox, *The New Directory for Baptist Churches* 7

Robert's Rules of Order 7

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

No. 80-2160

LORRAINE A. WILLIAMS and CHARLES E. WILLIAMS,
on behalf of themselves and on behalf of the congregation
of the MT. JEZREEL BAPTIST CHURCH,
a District of Columbia corporation,
Petitioners,

v.

AULIN E. JOHNSON, BALIS A. DUNLAP, Jr.,
GEORGE A. BROWN, JOHN A. DAVIS,
ANDREW T. FLEMING, ROBERT HAIGLER,
NELSON C. MALONE, YVONNE SMITH,
ELDRIDGE SPEARMAN, WILLIAM SWANN
and BERNARD A. WADE, individually and as trustees
of the MT. JEZREEL BAPTIST CHURCH, and
HAROLD E. TRAMMELL, pastor,
Respondents.

REPLY BRIEF OF PETITIONERS FOR WRIT OF CERTIORARI

THE TRIAL COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS (1) IN DENYING SUMMARY JUDGMENT FOR AN ACCOUNTING BASED ON THE FIDUCIARY RELATION

EXISTING BETWEEN THE PARTIES; (2) IN MOOTING A TIMELY DISCOVERY MOTION (THAT HAD BEEN PENDING DETERMINATION SIX MONTHS) BY THE *SUA SPONTE* DISMISSAL OF PETITIONERS' CLAIM FOR AN ACCOUNTING, AND (3) IN REQUIRING THAT PETITIONERS PROVE THE FRAUD GROUND OF THE CLAIM PRIOR TO TRIAL. SANCTION OF THE TRIAL COURT'S PROCEDURE BY THE COURT BELOW CALLS FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1. In their attempt to justify the *sua sponte* dismissal of petitioners' accounting suit, respondents rely entirely on the trial judge's treatment of the discovery motion filed January 16, 1979, to compel disclosure of the Church's tax returns as "totally frivolous" and his conclusion that "petitioners did nothing for nine months" between March 7, 1978, when their motion for summary judgment was denied, and January 16, 1979, when the discovery motion was filed. (The docket sheets, Record, 972-980, show that during that period petitioners took testimony on oral deposition in June, July, and October of 1978.)

At the very first status hearing on July 5, 1977, when petitioners reported that respondents failed to produce the Church's books of account for inspection, respondents indicated that all of the day care center records had been turned over to the IRS and that other financial records of the Church had been misplaced. The trial judge then suggested that the respondent-trustees be deposed and asked to explain on the record what happened to each category of records sought. At the same time, the trial judge suggested that the deposition of IRS personnel be taken in an anteroom of his courtroom so that he could be available to rule on objections

to disclosure of the Church's tax returns and return information. Petitioners followed the suggested procedure.

Revenue Officer Elmer Matthews appeared for the taking of his deposition on November 27, 1977, at which time the trial judge was on hand. However, none of the respondents attended. Their counsel of record was present but without authority to consent to disclosure of the records of the Church and its wholly-owned day care center. He did produce a power of attorney given him by the manager of the day care center, whereupon the IRS turned over the TDA (taxpayer delinquent account) file of the day care center and the 100-percent penalty file of the manager. (Record, 565-570.)

Therafter on May 3, and May 16, 1978, IRS produced the same files for inspection pursuant to the limited consent of the respondents. (Record, 567, 576, 631.) But IRS refused to disclose the more complete TDA file of the Church in the absence of respondents' consent. (Record, 569-570.) Petitioners' motion to compel respondents to consent to disclosure of that file was therefore filed January 16, 1979, after informal attempts to obtain their consent wholly failed.

Obviously, the motion to compel (Record, 872) is not frivolous on its face. And, in light of the circumstances set forth above, the motion is not wholly and plainly devoid of merit or without any support in reason. The motion is not without foundation, color or semblance of merit. Its underlying theory is not frivolous.[1]

[1]A motion requiring the IRS to itemize documents when plaintiff was able to examine the documents themselves, for example, is a frivolous motion. *Barney v. IRS*, 618 F.2d 1268, 1274 (8th Cir. 1980). A motion to have the IRS audited is patently frivolous. *Kelley v. United States*, 536 F.2d 897, 899 (9th Cir. 1976). And motions involving mooted claims or claims precluded by res judicata are legally frivolous. *Browning Debenture Holders Committee v. DASA Corp.*, 605 F.2d 35 (2d Cir. 1978).

Respondents' oppostion to the motion presented a bona fide factual issue, *i.e.*, whether all the tax records requested had been disclosed, which is not plainly frivolous or completely irrelevant. One of the issues relied on by the trial judge as a genuine issue of fact in denying the motion for summary judgment (Record, 861) was whether the Church is liable for the delinquent taxes. The respondents argued that the Church is not liable because the day care center was a separate entity. Yet the occupancy permit to operate the day care center, issued by the District of Columbia licensing authority to the Church, shows on its face that the day care center operated on Church premises is wholly owned by the Church. (Record, 809-810.)

With notices of Federal tax liens on file in the recorder's office, and absence of the Church's books of account, petitioners should have been afforded the opportunity to reconstruct a portion of the Church's income and expenses from tax return information. Moreover petitioners had a right to know whether duplicate assessments had been made against the Church, and whether the IRS intended to write off any part of the liability as uncollectible. But the right was arbitrarily denied by the questioned procedure followed by the trial judge.

Since the motion to compel respondent's consent to disclosure of the Church's TDA file was not patently frivolous, the motion should have been determined on the merits prior to any determination to order an involuntary dismissal for failure to prosecute. Had the motion been determined on the merits, either for or against petitioners, the *sua sponte* dismissal in question would have no basis in law or fact because the alleged 9-month period of prosecutorial inactivity, relied on by the trial judge, would have been reduced to three months.

Thus, petitioners submit that in mooting the motion by the involuntary dismissal of the complaint, the trial court departed from the accepted and usual course of judicial proceedings and denied petitioners their day in court.[2] Sanction of the procedure by the court below calls for an exercise of this Court's power of supervision.

Respondents argue that "[t]here is not a significant federal question nor are there any rights needing protection." (Brief, 6.) Petitioners submit, on the contrary, that the issue—of whether Rule 41(b) of the Federal Rules of Civil Procedure (which by law is binding on the courts below) authorizes mooting a discovery motion (that has been pending determination for a period of six months) by the involuntary dismissal of the claim—presents a substantial federal question respecting a substantial federal right, *viz.*, the right to sue, including the right to equal access to justice. Petitioners submit that there is no authority in Rule 41(b) or any other rule for a trial court—unable to determine a discovery motion for a period of six months—to *sua sponte* dismiss the case on theground of a 9-month delay in prosecuting it. *Cf. Sibron v. New York,* 392 U.S. 40, 53 (1968), where the state's argument that a convict's case was mooted by his failure to timely appeal was rejected because the state had denied the convict access to the appellate courts, and thus review by the federal courts, until he had been released.

2. Respondents' counterstatement of the issue presented by the petition, if accepted, demonstrates that petitioners' right of procedural due process was indeed denied by the trial judge's requirement that petitioners prove their fraud allega-

[2]The determination that a motion is frivolous embraces the conclusion that it is prosecuted for delay. Petitioners' good-faith reason for prosecuting the motion would have been ascertained at a hearing thereon.

tion prior to trial and by affirmance of that procedure by the court below.

Respondents state that the single question presented here is whether the trial judge abused his discretion in dismissing the complaint, *sua sponte,* upon finding that petitioners made no showing of wrongdoing on the part of respondents prior to trial, and that petitioners failed, "upon repeated informal requests and an [oral] order of the court to make such a showing."

The complaint (Record, 778) alleges a real and substantial (not merely colorable) claim for an accounting. Ostensibly, the respondents agreed since the case was determined to be complex and classified as a Civil I case upon respondents' motion.

The question of whether petitioners were entitled to entry of an order to account based on the fiduciary relation existing between the parties is the primary issue in the case. The alleged fraud, though important, is a secondary issue and separate ground for recovery. Consequently, the requirement of the trial judge that petitioners prove the alleged fraud prior to trial under the pain and penalty of dismissal of their claim for an accounting effectively denied petitioners of their right to a trial of that issue.

The purpose of pretrial proceedings is "to define the claims and defenses of the parties for purposes of eliminating unnecessary proof and issues and thereby expediting the trial." Thus, "pretrial proceedings are designed to complement the trial function and should not be used to invade that function by resolving issues of fact." *McBryde v. Amoco Oil Co.,* 404 A.2d 201, 203 (D.C. App. 1979).

The court below abandoned this announced principle in affirming the procedure in issue on this petition.

3. Finally, in a footnote, the court below, misapprehending the facts and applicable law, indicated that petitioner Charles E. Williams lacked standing to sue because he had been "voted out of the church." (Petition, 3b.) Even though the Church did, on an irregular occasion, vote to withdraw fellowship, the congregation never in fact withdrew petitioner's right to participate in the Eucharist or communion, prayers, and other religious exercises of the communing fellowship. Under the discipline and the law, petitioner's right to participate in the general corporate membership meetings was not affected by the vote to withdraw fellowship. The parties agreed that Hiscox, *The New Directory for Baptist Churches,* and *Robert's Rules of Order* form the basis of the discipline of the Mt. Jezreel Baptist Church. (Record, 934, ¶ 7.) Under Hiscox, the congregation consists of two official bodies—the Church or communing fellowship and the society or corporate body. While one body exists within the pale of the other, the corporate body and the communing fellowship are in no respect correlative. 66 AM. JUR.2d, *Religious Societies* §5 (1973).

> Where the church and the corporation set up to manage is business affairs exist as separate entities, membership in one is not identical with membership in the other. In this regard, it has been held that neither of these organizations has any power to expel a member from the other. [*Id.* §9.]

Cf. Bouldin v. Alexander, 15 Wall. (82 U.S.) 131, 140 (1873), where this Court held that excommunication of trustees from the communing fellowship at an irregular meeting of the Third Baptist Church [in the District of Columbia] did not disqualify them as trustees of the corporate body, and that they would not have been disqualified had the excision been regular. Hiscox adopts that principle.

Jurisdiction and standing are alleged in the verified amended complaint (Record, 779) as follows:

> 1. Jurisdiction of this Court is founded on *D.C. Code Ann.* §11-921(a)(6) (1973 ed.).
>
> 2. The Mt. Jezreel Baptist Church is a religious society or congregation organized in 1883 under the general incorporation law for the District of Columbia, ... *D.C. Code Ann.* § §29-501 thru 29-516 (1973 ed.). The discipline states that the congregation or "corporate body is a *society* composed of all attendants who are regular contributors, whether members of the Church or not." Hiscox, *New Directory for Baptist Churches,* p. 117.
>
> 3. Plaintiffs are citizens resident in the District of Columbia or nearby Maryland as indicated above. Charles E. Williams has been an attendant and regular contributor to the Church continuously since 1966. All other plaintiffs have been communicants of the Church in good standing continuously for periods of between 20 and 40 years. As such, plaintiffs fairly and adequately represent members of the congregation similarly situated in enforcing their rights and the right of the corporate body to an accounting and other relief.

At the pretrial conference, respondents' counsel stated that he had no objection to referral of the case to the court auditor if the petitioners would bear the costs. However, he argued that the court ought to dispose of the preliminary questions regarding the standing of four plaintiffs (not including petitioner Lorraine A. Williams) to sue for an accounting and act as class agents, as well as the legal sufficiency of the complaint as to those trustees who had been elected to office in December of 1976 after the periods subject to audit examination. The court replied that the proper way to raise questions of standing and personal jurisdiction is by motion and stated that case would not be

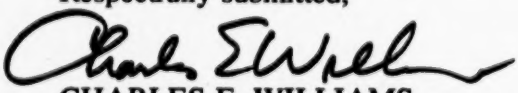
referred to the auditor until the preliminary matters had been disposed of upon motions to be filed by the respondents to which petitioners would timely respond. But respondents never filed the motions. (Record, 921, pars. 15, 17.)

The issue of standing is usually decided on the pleadings, "Normally, mere allegations will suffice" to establish standing, "but, if controverted by the defendant, the plaintiff must demonstrate facts supporting his allegations." *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714, note 22 (D.C. Cir. 1977). But, as indicated, respondents failed to controvert the verified allegations of standing. Consequently, the tentative conclusion of the court below relative to standing is without evidentiary support. Such a conclusion is the final example of the departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For the foregoing reasons, and those stated in the petition, petitioners respectfully pray that the relief prayed for in the petition for review by certiorari be granted.

Respectfully submitted,

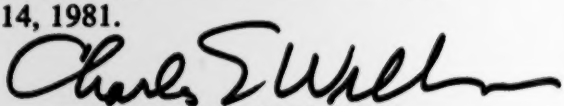


CHARLES E. WILLIAMS
1329 Shepherd Street, N.W.
Washington, D.C. 20011
Attorney for Petitioners

August, 1981

CERTIFICATE OF SERVICE

I certify that four copies of the foregoing reply brief were served upon counsel of record for the respondents, Blaine P. Friedlander, Esq., Suite 309, Mosby Building, 10560 Main Street, Fairfax, VA 22030, by certified mail No. P02 6100055, on August 14, 1981.



CHARLES E. WILLIAMS
Attorney for Petitioners